IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

(1) SPL. APPL. WRIT No. 89 of 2001

DEV KISHAN
V/S
STATE & ORS

(2) SPL. APPL. WRIT No. 113 of 2001

RAM NATH
V/S
STATE & ORS

Mr. R.K.SONI) for the appellant/petitioners.
Mr. IR CHOUDHARY)
Mr. H.R.SONI,ADDL.GA, for the respondents.

Date of Order : 12.12.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

JUDGMENT

Aggrieved by the judgment dated 4.12.2000, whereby three writ petitions were decided, two appeals have been maintained against the judgment in Writ Petitions 4588/96 and 4589/96.

The writ petitions were dismissed, mainly on the ground that regularization cannot be granted to an employee, whose service has already been terminated and so far as challenge to the order of termination, learned Single Judge held that there exists large number of preliminary objections and disputed questions of facts

which cannot be determined in the writ jurisdiction, therefore, after granting liberty to the petitioner to approach appropriate forum, the petitions were dismissed. However, while dismissing the writ petition, it was directed that looking to the pendency of the writ petition for three to four years, proceeding before the conciliation officer is dispensed with and if the petitioners approach the conciliation officer, reference may be made accordingly.

The challenge to the aforesaid judgment has been made,mainly on the ground that there exists no disputed question of fact, therefore, irrespective of availability of alternative remedy, the matter could have been adjudicated by the Court, exercising its jurisdiction under Article 226 of the Constitution. Narrating the facts, learned counsel for the appellants mainly referred to and relied on the facts existed in Writ Petition No.4588/96. It was contended that the appellant was appointed as Class IV servant and, thereafter, continued for years together. However, when benefit of regularization was not given, petitioner had preferred a writ petition in the year, 1994, for seeking benefit of regularization. The said writ petition was, thereafter, decided with the following directions :-

> "This petition was heard along with a bunch of similar cases. The case law on the point

> has been discussed in details in S.B.Civil Writ Petition No.3453/94 (Anskalin Samaj KalyanSangh, Banswara v.State & Ors).
>
> In the facts & circumstances of the case, it is held that the petitioner is discharging duties of a full time servant.
>
> The petition is allowed. The respondents are directed to pay to the petitioner minimum pay in the lowest pay scale applicable to the post of regular scale applicable to the post of regular Class IV Servant from the date of filing of the petition and consider regularization of his services in the light of directions made in order being passed today in S. B. Civil Writ Petition No.3453/94 (Anskalin Samaj Kalyan Sangh, Banswara v. State & Others), decided on May 26, 1995. The relief will be given only if the petitioner was in service on the date of filing of the petition. No order as to costs."

Referring to the directions quoted above, it was submitted by the learned counsel for the appellant that the petitioner was not extended the benefit as was given in the judgment, rather respondent passed a fresh order of termination on 5.12.96, after narrating reason of termination to be non-existence of the post of Jaldhari.

Aggrieved by the order of termination dated 5.12.96, petitioner again preferred a writ petition, not only to challenge the order of termination dated 5.12.96 but to

further pray for grant of benefit of regularization.

A detailed reply and additional affidavit to the writ petition were filed by the respondent, stating therein that service of the petitioner was first terminated vide order dated 11.1.94, making it effective from 15.1.1994. The said order was offered to the petitioner through the Principal, but petitioner then refused to accept the same, therefore, it was sent through Registered Post. However, Registered Post also returned unserved with the remark that the petitioner was not found available at his residence. Petitioner filed a counter-affidavit, and stated that he had not refused to accept the order of termination when it was sent through the Registered Post, therefore, factual contention narrated in the additional affidavit of the respondent was seriously disputed. The plea of the petitioner was that when he preferred earlier writ petition then on the date of filing of the writ petition, he was in service which fact was not disputed by the respondents in their return of the first writ petition. Yet, the benefit as was awarded by the Hon'ble High Court vide its judgment dated 26.5.1995, was not deliberately extended, rather to nullify the directions given therein, the impugned order of termination dated 5.12.96 was issued and now to justify the action, respondents have come with the plea that on the date of filing of the writ petition in the year, 1994, the petitioner was not in service, thus, he

was not entitled for the benefits as were ordered by the Hon'ble High Court. In the counter affidavit filed by the petitioner, it was also stated that the earlier order of termination dated 11.1.1994 was not served on him, therefore, he should be treated in service and entitled for all consequential benefits, including regularization and as a consequence of which to seek a direction to set aside the termination order dated 5.12.96. Learned counsel for the appellant further argued that even if services of the petitioner were terminated after lapse of 22 years, then also, he should have been awarded benefit of pension.

Per contra, Learned counsel for State, supporting the judgment of the learned Single Judge, urged that looking to the denial of facts narrated in the writ petition through the reply, not only there exists disputed questions of facts, but looking to the contentions exist in the additional affidavit filed by the State and the counter-affidavit filed by the petitioner, it becomes more than clear that various disputed questions of facts exist, like the fact as to whether the earlier termination order dated 11.1.94 was offered to the petitioner or not ? This is apart from the fact that the subsequent order dated 5.12.1996 was passed, after invoking and compliance of the provisions of Section 25F of the Industrial Disputes Act. Thus, the petitioner is having efficacious, alternative remedy under the provisions of the Act of 1947 itself, but,

without exhausting those remedies, a writ petition was erroneously filed by the petitioner. It was further urged that even while filing the writ petition, petitioner has not pleaded that the order dated 5.12.96 has been passed in violation of the provisions of the Industrial Disputes Act. Therefore, there is no serious challenge to the order of termination as it was urged that even on merits, there exists no ground to challenge the order of termination dated 5.12.96. It was lastly urged that an argument regarding pension is raised only during the course of arguments, otherwise other than the ground raised, no prayer in this regard is being made, apart from the fact that an employee terminated, is not entitled for the benefit of pension.

We have considered the rival submissions of the learned counsel for the parties and scanned the record carefully. Perusal of the order dated 5.12.96 reveals that the said order was passed, after invoking the provisions of Section 25F of the Industrial Disputes Act and the reason of termination has also been specified to be non-existence of the post as the same was not created. It is a settled proposition of law that if there exists alternative remedy, one is required to exhaust the said remedy. However, High Court under Article 226 of the Constitution can entertain a writ petition by exercising its discretion. In the present matter, learned Single Judge refused to exercise

his discretion for the reasons given in the judgment, however, petitioner was given liberty to approach the conciliation officer and looking to the pendency of the writ petition for three to four years, further directed to refer the matter. This discretion was exercised by the learned Single Judge taking note of the fact that not only there exists preliminary objection regarding maintainability of the writ petition, but there exists even disputed questions of facts. The argument of the learned counsel that petition involves no question of fact, does not seem to be sound as perusal of the writ petition and reply and subsequent additional affidavit and counter-affidavit reveals that there exists disputed questions of facts, if the entire pleading is to be taken into consideration for its decision. Even from the argument of the learned counsel for the appellant, it reveals that the appellant has disputed even the offer of the first order of termination dated 11.1.94 and, therefore, questioning the entire action of the respondent State on account of non-compliance of the earlier judgment dated 26.5.95. Here the question arises as to whether on the date of filing of the earlier writ petition in 1994, the petitioner was in service or not ? According to the petitioner, he was in service, whereas according to the respondents, petitioner was not in service on the date of filing of the first writ petition. Without going into the effect of said factual aspect, so disputed, it has further been seen that even

the service of the order of termination dated 11.1.94 has also been disputed seriously. Though, learned counsel for the appellant, while referring to the part of the reply given by the respondents, in the earlier writ petition of 1994, has shown that therein, the respondents had not disputed continuity of the petitioner, but then pleading of first writ petition comes to an end with its decision, more so, while deciding the first writ petition vide order dated 26.5.95, even the learned Single Judge imposed a condition for grant of benefit, i.e, if the petitioner was in service "on the date of filing of the petition", There was no reason to impose such a condition if facts were so clear in the said writ petition, when the effect of said condition and many other facts have been stated in this writ petition, as well as in reply and in the affidavits, controverting the facts by the parties then for adjudicating the writ petition in reference, pleading of first writ petition cannot be made a basis, because hearing of first writ petition gets exhausted with its decision. In any case, facts mentioned above show that there exists questions of facts to be determined by leading proper evidence, hence we find that there exists no illegality in the judgment of the learned Single Judge, while giving liberty to the petitioner to exhaust alternative remedy, therefore, we need not to go into question. Then even there is no serious challenge to the order dated 5.12.96, on the ground that the said order was passed after complying with

the provisions of Section 25F of the Industrial Disputes Act and there exists no ground to question the said order by showing non-compliance of any of the provisions of the Industrial Disputes Act. In fact, we leave this issue open for its adjudication by the appropriate forum, if the petitioners so choose to approach.

So far as the prayer for pension made by the learned counsel for the appellant, during the course of arguments, we find that no prayer exists in the writ petition, therefore, at the stage of hearing of appeal, we cannot accept an oral prayer which was not made even in the writ petition.

In view of the discussion made above, we do not find any error in the judgment of the learned Single Judge. Hence both the appeals fails and accordingly the same are dismissed with no order as to costs.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

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